88-1898 (1)

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NO.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BYRON REECE, TERRY R. STYERS, J-R DISTRIBUTORS, INC., a Washington corporation, RICHARD NELSON REGAN and MICHAEL DAVID REGAN, Petitioners,

v.

STATE OF WASHINGTON, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

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1. QUESTION PRESENTED FOR REVIEW

Is a state obscenity law that requires consideration of the context in which allegedly obscene matter is "used" in determining whether it has serious literary, artistic, political, or scientific value constitutional under the First and Fourteenth Amendments, especially when incorporated into a criminal statute that applies only if the matter is used for profit-making purposes?

2. PARTIES

The caption of the case in this Court contains all of the parties. J-R Distributors, Inc., a corporation, is closely-held and has no parent companies, subsidiaries or affiliates.

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5. DECISION BELOW

The opinion below is reported at 110 Wn.2d 766 (1988), and 757 P.2d 947 (1988). It is reproduced at Appendix A.

6. JURISDICTION

The opinion of the Supreme Court of Washington was filed on June 23, 1988, and the final judgment was entered March 23, 1989. Appendix B. The order denying petitioners' motion for reconsideration was entered March 23, 1989. Appendix C. Jurisdiction to review the judgment by writ of certiorari is conferred by 28 U.S.C. § 1257 (a).

7. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;

or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1, Fourteenth Amendment to the Constitution of the United States:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 9.68.140 of the Revised Code of Washington (RCW 9.68.140):

> A person who, for profit-making purposes and with knowledge, sells, exhibits, displays, or produces any lewd matter as defined in RCW 7.48A.010 is guilty of promoting pornography. Promoting pornography is a class C felony and shall bear the punishment and fines prescribed for that class of felony. In imposing the criminal penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the felony. All

> fines assessed under this chapter shall be paid into the general treasury of the state.

Section 7.48A.010 of the Revised Code of Washington (RCW 7.48A.010) is lengthy and is reproduced in the appendix. The critical portion reads:

> (2) "Lewd matter" is synonymous with "obscene matter" and means any matter:
>
> . . .
>
> (c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

8. STATEMENT OF THE CASE

Two cases were consolidated on appeal by the Supreme Court of Washington.

No. 52665-6 (the Pierce County case) was an appeal by petitioners Reece, Styers and J-R Distributors, Inc., from convictions in the Superior Court for Pierce County of violating RCW 9.68.140 (promoting pornography). Before trial

they moved to dismiss the information on the ground, inter alia, that Washington's definition of "lewd matter" was unconstitutional under the First and Fourteenth Amendments because of the requirement that the serious literary, artistic, political, or scientific value of the allegedly obscene matter be determined by reference to "the context in which it is used." The portion of petitioners' motion raising that issue is set forth at Appendix D.

The motion was denied, the case proceeded to trial, the defendants were convicted and appealed. The issue was again raised on appeal. The portion of petitioners' brief in the Washington Supreme Court addressing this issue is set forth at Appendix E.

No. 53565-5 (the King County case), was an appeal by the State of Washington

from an order dismissing an information charging J-R Distributors, Inc. and the two Regans with 38 counts of promoting pornography and 55 counts of attempt to promote pornography. The trial court held that RCW 9.68.140 was unconstitutional under the Washington State Constitution. 110 Wn.2d, at 770.

The trial court did not reach the alternative federal constitutional grounds urged by petitioners, including that the statutory definition of "lewd matter" is unconstitutional on its face because of the requirement that serious value be determined by reference to the context of use. Portions of petitioners' motion in the trial court addressing that issue are set forth at Appendix F. The portion of the petitioners' brief in the Washington Supreme Court advancing that ground is set forth at Appendix G.

On appeal, the Washington Supreme Court affirmed the Pierce County case and reversed the King County case, holding (5-4) that Washington's obscenity law is constitutional under both the state and federal constitutions. Appendix A.

8. ARGUMENT

WHETHER UNDER THE FIRST AND FOURTEENTH AMENDMENTS THE SERIOUS VALUE OF AN ALLEGEDLY OBSCENE WORK CAN CONSTITUTIONALLY BE DETERMINED BY REFERENCE TO THE CONTEXT IN WHICH IT IS USED IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND WAS DECIDED BY THE COURT BELOW IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

A. Overview.

The precise question presented in this case--whether a state may constitutionally provide that an allegedly obscene work's serious value be judged by reference to the context in which it is used--has not previously been

decided by this Court. Protection of works having serious literary, artistic, political, or scientific value goes to the very heart and soul of the First Amendment. Whether a state may water-down that bulwark against obscenity's erosion of First Amendment values is an important question of federal constitutional law that should be settled by this Court.

In Pope v. Illinois, 481 U.S. ____, 95 L. Ed. 2d 439 (1987), the Court struck down an Illinois obscenity law requiring that serious value be determined by reference to contemporary community standards. The decision of the Washington Supreme Court below conflicts with the essence of that decision.

For these reasons, review by certiorari is appropriate under Rule 17.1(c).

B. Washington statutes.

Petitioners were charged with violating RCW 9.68.140, which provides:

> A person who, for profit-making purposes and with knowledge, sells exhibits, displays, or produces any lewd matter as defined in RCW 7.48A.010 is guilty of promoting pornography.

RCW 7.48A.010(2) defines "lewd matter." With a couple of exceptions, the definition generally tracks the test laid down in Miller v. California, 413 U.S. 15 (1973).[1]

The third prong of the Miller test is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S., at 24. The third prong of

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1. In Brockett v. Spokane Arcades, 472 U.S. 491 (1985), the Court held that Washington's definition of "prurient" was unconstitutionally overbroad, but severable. The question presented in this case was not before the Court in Brockett. 472 U.S., at 494 (footnote 3).

Washington's definition of "lewd matter" is whether the matter "when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value." RCW 7.48A.010(2)(c) (emphasis added).

Apparently only one other state now has a materially similar provision written into its obscenity law. See Idaho Code, section 18-4101(A)(2) (1976).[2]

C. The decision below rests on an inapplicable principle.

The Washington Supreme Court summarily rejected petitioners' claim that the requirement that serious value

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2. "Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value."

be determined on the basis of "the context in which it is used" renders the Washington statute unconstitutional on its face under the First and Fourteenth Amendments, stating simply "context considerations are permissible in obscenity cases." 110 Wn.2d, at 773. The court cited Splawn v. California, 431 U.S. 595, 589-99 (1977).

Splawn is a pandering case. In Splawn the Court held that it was not constitutional error for the trial court to have given a pandering instruction, advising the jury that it could consider "the circumstances of sale and distribution" of the matter, and particulary "whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal," in determing whether the matter had any

redeeming social importance. 431 U.S., at 597-98.

Petitioners assume, for the sake of argument, that pandering remains a viable concept since Miller discarded the utterly without redeeming social value criteria in favor of the less stringent serious value test.[3] That concept does not support the broad proposition that "context" may be considered on the value question in all cases, and certainly not the "context" in which the matter is "used."

Pandering is "the business of purveying textual or graphic matter openly advertised to appeal to the erotic

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3. All pandering cases decided by this Court were tried under the pre-Miller utterly without redeeming social value test. See, Pinkus v. United States, 436 U.S. 293 (1978), Splawn v. California, supra, Hamling v. United States, 418 U.S. 87 (1974), and Ginzburg v. United States, 383 U.S. 463 (1966).

interest of their customers." Ginzburg v. United States, 383 U.S. 463, 467 (1966), quoting from Roth v. United States, 354 U.S. 476, 495-96 (1957) (Warren, C. J., concurring). A pandering instruction may be given only if there is evidence to support it. See Pinkus v. United States, 436 U.S. 293 (1978). Clearly this Court's pandering concept does not authorize a substantive statutory element requiring consderation of the context of use in all cases.

More importantly, the context of "use" of a book, magazine, or film is vastly different than just the manner of its creation, promotion, sale or distribution. While context of "use" might arguably include such matters, it is certainly not limited to them.

Moreover, the Washington law is silent as to the effect that various

contexts of use have on the value determination. It provides no standards as to what uses, if any, might enhance a work's serious value, and what uses might subtract from or obviate its serious value.

D. The decision below conflicts with Pope v. Illinois.

In Pope v. Illinois, 481 U.S. ____, 95 L. Ed 2d 439 (1987), the Court struck down Illinois' attempt to have a work's serious value determined by reference to contemporary community standards. The Court said:

> In Miller itself, the Court was careful to point out that "[t]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent." 413 U.S., at 34. Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does

> the value of the work vary from community to communty based on the degree of local acceptance it has won. The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.

481 U.S., at ____, 95 L. Ed. 2d, at 445.

Like the Illinois law, Washington's statute introduces an alien factor into the serious value question. The Illinois law permitted condemnation of a work that a reasonable person would find had serious value on its face because of a jury's perception that local community standards of value were different. The Washington law allows condemnation of a work that a reasonable person would find has serious value because of the context of the use of the work.

Perhaps the most glaring constitutional problem with the

Washington statute is the significant danger that in criminal cases the serious value element is essentially eliminated. RCW 9.68.140 criminalizes the sale, exhibition, display, or production of "lewd matter" if done "for profit-making purposes." A bookseller who "uses" a book for "profit-making purposes" necessarily "uses" it for its commercial value, and not for any serious literary, artistic, political, or scientific value it may have. In the "context" of that "use," the work's serious literary, artistic, political, or scientific value would likely be considered immaterial by a jury.

The Washington statute also suffers from the same infirmity as the Illinois statute involved in Pope. The "context in which" matter is "used" necessarily includes the place or community in which

it is "used." Under a directive to consider the "context in which it is used," there is always the risk that "a jury member could consider himself bound to follow prevailing local views on value without considering whether a reasonable person would arrive at a different conclusion." Pope, 481 U.S., at ____, 95 L. Ed. 2d, at 445 (footnote 3).

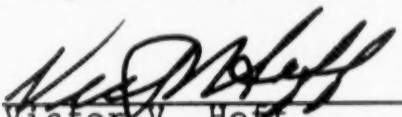
In Miller the Court said that

> in the area of freedom of speech and press the courts must always remain sensitive to any infringement of genuinely serious, literary, artistic, political or scientific expression.

413 U.S., at 22-23. In Pope, that sensitivity led this Court to strike down the Illinois requirement that serious value be determined by reference to contemporary community standards, and should lead this Court to grant review in

this case.

Respectfully submitted,



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Dated: May 12, 1989

APPENDIX

Appendix A: Decision Below

Appendix B: Mandate of Supreme Court of Washington

Appendix C: Order Denying Motion for Reconsideration

Appendix D: Portion of Motion to Dismiss in Pierce County Case (Washington Supreme Court No. 52665-6)

Appendix E: Portion of Appellants' Brief in Pierce County Case in Supreme Court of Washington (No. 52665-6)

Appendix F: Portion of Motion to Dismiss in King County Case (Washington Supreme Court No. 53565-5)

Appendix G: Portion of Respondents' Brief in King County Case in Supreme Court of Washington (No. 53565-5)

Appendix H: Complete Text of RCW 7.48A.010

[Nos. 52665–6; 53565–5. En Banc. June 23, 1988.]

THE STATE OF WASHINGTON, *Respondent*, v. BYRON B. REECE, ET AL, *Appellants*.

THE STATE OF WASHINGTON, *Appellant*, v. J–R DISTRIBUTORS, INC., ET AL, *Respondents*.

[1] **Criminal Law — Statutes — Construction — Saving Construction.** Facial deficiencies of a criminal statute may be cured by a court's construction of the statute.

[2] **Obscenity — Promoting Pornography — Statutory Provisions — Validity.** The statutory definition of the crime of promoting pornography (RCW 9.68.140) and the statutory definition of "lewd matter" (RCW 7.48A.010) that it incorporates do not violate the federal or state guaranties of freedom of speech (U.S. Const. amend. 1; Const. art. 1, § 5).

[3] **Constitutional Law — Construction — Independent State Interpretation — Factors.** In deciding whether a state constitutional provision is more protective of individual rights than its federal counterpart, a court will examine the language of the state constitution, differences in the language of the state and federal constitutions, the history of the state constitution, state law in existence at the time of the ratification of the constitution, structural differences between the state and federal constitutions, and whether the matter is of state interest or local concern.

[4] **Constitutional Law — Freedom of Speech — Obscenity — State and Federal Constitutions.** Const. art. 1, § 5 provides no greater protection to obscene speech than afforded by the First Amendment.

[5] **Obscenity — Proof — Expert Testimony — Necessity — Material Directed to Deviant Subgroup.** Expert testimony is not required to prove the prurient appeal of material directed to a deviant sexual subgroup.

[6] **Obscenity — Promoting Pornography — Statutory Provisions — Profit-Making Purposes — What Constitutes.** An employee's acts that further his private employer's purpose of making profits from the sale of obscene material satisfy the "for profit-making purposes" element of the crime of promoting pornography (RCW 9.68.140), regardless of whether he shares in the profits of the business.

ANDERSEN, J., concurs by separate opinion; UTTER and CALLOW, JJ., PEARSON, C.J., and BRACHTENBACH, J., dissent by separate opinions.

Nature of Action: In separate prosecutions the defendants were charged with promoting pornography and attempting to promote pornography for selling and displaying magazines featuring sadomasochism.

Superior Court: In the Reece prosecution, the Superior Court for Pierce County, No. 85-1-01180-7, Waldo F. Stone, J., on April 16, 1986, entered a judgment on verdicts finding the defendants to be guilty. In the J-R Distributors prosecution, the Superior Court for King County, No. 86-1-04406-6, Jim Bates, J., dismissed the charges on February 4, 1987.

Supreme Court: Holding that the statutory definition of promoting pornography did not viclate the federal or

state constitutional guaranty of free speech, that the magazines depicted violent or destructive sexual acts, that expert testimony was not required to convict the defendants, and that there was sufficient evidence of the defendants' intent to make a profit, the court *affirms* the judgment in the Reece prosecution and *reverses* the judgment in the J–R Distributors prosecution.

Norm Maleng, Prosecuting Attorney for King County, and *Michael M. Danko, Deputy,* for appellant State.

Victor V. Hoff, for appellants Reece, et al, and respondents J–R Distributors, et al.

John W. Ladenburg, Prosecuting Attorney for Pierce County, and *Chris Quinn–Brintnall, Senior Appellate Deputy,* for respondent State.

GOODLOE, J.—These two cases concern the constitutionality of Washington's criminal obscenity statute, RCW 9.68.140, and the definition of "lewd matter" it incorporates from RCW 7.48A.010. In both cases defendants were charged with promoting pornography in violation of RCW 9.68.140. Defendants in State v. Reece were convicted in Pierce County, whereas defendants in State v. J–R Distributors had their charges dismissed in King County. This court then granted direct review to the defendants in Reece and to the State in J–R Distributors. We affirm the defendants' convictions in Reece. We reverse the trial court's ruling in J–R Distributors and remand for proceedings in accordance with this opinion.

FACTS

State v. Reece

Defendant J–R Distributors, Inc., owned and operated a retail adult book store in Tacoma. Defendant Byron Reece was employed as a manager at the store and defendant Terry Styers was employed as a clerk. Reece was paid an annual salary and Styers was paid by the hour.

On July 16, 1985, Pierce County Deputy Sheriff John Solheim purchased a copy of a magazine entitled *Chains and Whips*. The next day, a superior court judge signed a search warrant authorizing the seizure of any additional copies of the magazine, as well as any other literature explicitly depicting violent or destructive sexual acts, such as rape or torture. The officers promptly executed the warrant seizing two copies of *Chains and Whips* and more than 200 other magazines and books. The officers arrested Styers who was working on the premises and Reece who arrived during the search. Reece, Styers, and J–R Distributors were charged with the crime of promoting pornography for the sale, exhibition or display of "lewd matter", namely, two copies of *Chains and Whips*. *See* RCW 9.68.140; 7.48A.010.

The trial court denied defendants' motions to dismiss and the case proceeded to trial. To prove that *Chains and Whips* constituted "lewd matter" within the meaning of the statute, the State relied solely on the magazine. The magazine contains four articles with accompanying pictures. The articles are entitled: "London's Mercenary Masochists", "Foot Fetishism", "How to be a Bastard!", and "The Practice of Bondage". Most of the pictures mainly depict naked or scantily clad women being whipped, strangled, bound in a painful position, or threatened with a knife or other deadly object. In a few of the pictures, the women appear to have welts and blood smears. The magazine contains no depictions of masturbation, excretory functions, closely exposed genitals, or ultimate sex acts.

The trial court instructed the jury that in order to convict the defendants of promoting pornography, it must find that *Chains and Whips* was "lewd matter", that the defendants sold, exhibited or displayed that matter for profit–making purposes, and that they did so with knowledge. The jury found all three defendants guilty as charged.

State v. J-R Distributors, Inc.

Defendants J-R Distributors, Inc., and others were charged with 38 counts of promoting pornography and 55 counts of attempting to promote pornography. *See* RCW 9.68.140; 9A.28.020. These charges resulted from a search and seizure of defendants' Seattle retail outlet and warehouse on October 9, 1986. As described in the prosecutor's certification for determination of probable cause, the magazines seized depict sexually exposed women, and sometimes men, bound and/or gagged in various positions. Clamps, pins, and other items are used in various parts of the body. Whips and rods are often shown, and in some cases women are pictured with welts or marks on their bodies. The texts accompanying the photographs express the view that causing pain and requiring submission will result in heightened sexual pleasure.

Prior to trial, the defendants moved to dismiss on the ground that RCW 9.68.140 violated the free speech clause, article 1, section 5 of the Washington State Constitution. The presiding judge granted the motion and dismissed all charges. The dismissal order, entered February 4, 1987, states that the charges are dismissed on "independent state grounds". The State then sought direct review.

I

FEDERAL OBSCENITY DOCTRINE OVERVIEW

As a preliminary matter, we address defendants' contentions that RCW 9.68.140 and 7.48A.010 violate the first and fourteenth amendments to the United States Constitution. In beginning our analysis with federal law, we do not retreat from our general position that in resolving a constitutional law question we should turn first to the provisions of our own state constitution. *State v. Coe*, 101 Wn.2d 364, 373, 679 P.2d 353 (1984); *see also State v. Gunwall*, 106 Wn.2d 54, 67, 720 P.2d 808 (1986). Nevertheless, we commence here with First Amendment analysis under the belief that an overview of the United States Supreme Court's

position on obscenity will provide helpful background for the state constitutional analysis which follows.

In *Roth v. United States*, 354 U.S. 476, 484–85, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957), the United States Supreme Court held that "obscenity" is not protected under the First Amendment. This holding was based on a historical analysis suggesting that the First Amendment was never intended to protect all expression, but only expression containing some slight social importance. Under the *Roth* definition, as elaborated upon, a work was considered to be obscene when:

> (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 418, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1966).

The Supreme Court has further modified the *Roth* definition in several respects. First, in *Miller v. California*, 413 U.S. 15, 24, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973), the Court abandoned the "utterly without redeeming social value" part of the test and held that the State must instead show that the work, "taken as a whole, lacks serious literary, artistic, political, or scientific value." The *Miller* Court also held that, in determining whether a work appeals to the prurient interest, the trier of fact must apply "contemporary community standards" and further, that state law must specifically define the type of sexual conduct which, if depicted or described in a patently offensive manner, will be obscene. *Miller*, at 24. Later, in *Smith v. United States*, 431 U.S. 291, 301, 52 L. Ed. 2d 324, 97 S. Ct. 1756 (1977), the Court clarified the *Miller* test so as to require application of "contemporary community standards" to the determinations of both prurient interest and patent offensiveness. Finally, in a decision issued earlier this year

the Court held that "contemporary community standards" may *not* be applied to the third prong of the test; rather, the question of literary, artistic, political or scientific value must be determined solely on the basis of what a reasonable person would conclude. *See Pope v. Illinois*, ___ U.S. ___, 95 L. Ed. 2d 439, 444–45, 107 S. Ct. 1918 (1987).

[1] Although *Miller* required state law to specify the type of sexual acts which may be obscene, state courts are allowed to construe state statutes so as to cure any facial deficiencies. *See Ward v. Illinois*, 431 U.S. 767, 771, 52 L. Ed. 2d 738, 97 S. Ct. 2085 (1977). This court has twice construed a former obscenity statute, RCW 9.68.010, so as to conform to the federal obscenity test. *See State v. Regan*, 97 Wn.2d 47, 54, 640 P.2d 725 (1982); *State v. J–R Distribs., Inc.*, 82 Wn.2d 584, 512 P.2d 1049 (1973), *cert. denied*, 418 U.S. 949 (1974). The present statute, RCW 9.68.140, may also be so construed.

RCW 9.68.140 provides that a person is guilty of promoting pornography if he or she "for profit–making purposes and with knowledge, sells, exhibits, displays, or produces any lewd matter as defined in RCW 7.48A.010". RCW 7.48A.010 provides, in pertinent part:

> (2) "Lewd matter" is synonymous with "obscene matter" and means any matter:
>
> (a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and
>
> (b) Which explicitly depicts or describes patently offensive representations or descriptions of:
>
> (i) Ultimate sexual acts, normal or perverted, actual or simulated; or
>
> (ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or
>
> (iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and
>
> (c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

Since the magazines at issue here are of the "bondage and discipline" type, depicting sexual violence, coercion, and torture, these cases are exclusively governed by subsection (2)(b)(iii).

[2] As can be seen, RCW 7.48A.010 generally conforms to the obscenity definition found in *Miller* and *Smith*. Defendants claim error in the fact that the statute does not refer to "contemporary community standards" in the subsection on "patent offensiveness". However, the jury instructions in Reece supplied this missing element and thereby cured any facial deficiency in the statute. *See Ward*, at 771; *Regan*, at 51, 54. Defendants also claim error in the fact that subsection (2)(c) of the statute contains language, not found in *Miller*, that the suspect matter be considered "in the context in which it is used". However, context considerations are permissible in obscenity cases. *See Splawn v. California*, 431 U.S. 595, 598–99, 52 L. Ed. 2d 606, 97 S. Ct. 1987 (1977); *J–R Distribs.*, at 599. Defendants further argue that the statute is defective in light of *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 86 L. Ed. 2d 394, 105 S. Ct. 2794 (1985). *Brockett* held that the definition of "prurient interest" contained in RCW 7.48A.010 was overly broad to the extent it could be construed to include a normal and healthy interest in sex and not merely an interest that was morbid or shameful. However, the Court declined to strike down the statute in its entirety, reasoning that a limiting construction was possible. *Brockett*, at 504. Here, jury instructions given in Reece properly limited the statute.

Defendants also argue that the listing of "[v]iolent or destructive sexual acts" in RCW 7.48A.010(2)(b)(iii) is improper because it goes beyond the types of acts expressly contemplated in *Miller*. *Miller* gave "a few plain examples" of what a state could define for regulation. *See Miller*, at 25. However, *Miller* made clear these examples were not all encompassing and that the states were free to regulate, within constitutional guidelines, any form of "hard core" sexual conduct. *Miller*, at 27; *see also Ward*, at 773. Nor is

there any merit to defendants' argument that sadomasochistic materials must be combined with depictions of ultimate sex acts in order to qualify as obscene. It is sufficient that the material, taken as a whole, obscenely suggests intimate sexual activity. *See Mishkin v. New York*, 383 U.S. 502, 505–10, 16 L. Ed. 2d 56, 86 S. Ct. 958 (1966); *see also State v. Randall Book Corp.*, 53 Md. App. 30, 452 A.2d 187 (1982), *cert. denied*, 464 U.S. 919 (1983). The types of sadomasochistic materials proscribed by RCW 7.48A-.010(2)(b)(iii) are encompassed by the federal definition of obscenity. We conclude that RCW 9.68.140 and 7.48A.010 withstand scrutiny under the First and Fourteenth Amendments.

Defendants' main contention, however, is that even if these provisions can withstand scrutiny under the federal constitution, they are invalid under our state constitution. Defendants argue that Washington's free speech clause is broader than the First Amendment and must be independently construed. *See* Const. art. 1, § 5. In *Fine Arts Guild, Inc. v. Seattle*, 74 Wn.2d 503, 512, 445 P.2d 602 (1968), this court rejected this argument, reasoning that Const. art. 1, § 5 and the First Amendment were "in pari materia and inferentially interchangeable". However, in more recent years the court has in several instances given effect to textual differences between the two provisions. *See, e.g., Bering v. Share*, 106 Wn.2d 212, 233–34, 242–46, 721 P.2d 918 (1986), *cert. dismissed*, 93 L. Ed. 2d 990 (1987); *State v. Coe*, 101 Wn.2d 364, 375, 679 P.2d 353 (1984); *Alderwood Assocs. v. Washington Envtl. Coun.*, 96 Wn.2d 230, 635 P.2d 108 (1981); *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 615 P.2d 440 (1980). In light of these decisions, the validity of Washington's criminal obscenity statute under Const. art. 1, § 5 is truly a matter of first impression.

II

Obscenity Under the State's Free Speech Guaranty

The United States Supreme Court has consistently held that state courts may interpret their own constitutions to be more protective of individual rights than the federal constitution. *See, e.g., Pruneyard Shopping Ctr. v. Robins,* 447 U.S. 74, 81, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980); *Oregon v. Hass,* 420 U.S. 714, 719 & n.4, 43 L. Ed. 2d 570, 95 S. Ct. 1215 (1975). This court has frequently accepted that responsibility. *See, e.g., State v. Chrisman,* 100 Wn.2d 814, 817, 676 P.2d 419 (1984) (search and seizure); *State v. Fain,* 94 Wn.2d 387, 392, 617 P.2d 720 (1980) (cruel punishment); *Alderwood Assocs. v. Washington Envtl. Coun., supra* (free speech); *see generally* Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights,* 7 U. Puget Sound L. Rev. 491 (1984).

The State argues that the criteria enunciated by this court in *State v. Gunwall,* 106 Wn.2d 54, 58–59, 720 P.2d 808 (1986) forecloses the application of independent state constitutional analysis to matters of obscenity. The State reasons that Washington has never developed an independent tradition of protecting obscene speech: "obscene or indecent" literature was criminalized both immediately prior to and after the ratification of the state constitution. *See* Laws of 1885, p. 122–23; Laws of 1891, ch. 69, § 24. The State further argues that reliance on federal obscenity doctrine is appropriate because this court has never held that Const. art. 1, § 5 extends broader protection to obscenity than does the First Amendment. For example, *Coe* rejected the idea that the state constitution's absolute prohibition of prior restraints should extend to traditionally unprotected speech. *See Coe,* at 374–75 (citing *Fine Arts Guild, Inc. v. Seattle, supra*). We agree that Const. art. 1, § 5 should not be interpreted to afford greater protection to obscenity than that afforded by the federal courts under First Amendment analysis.

We hold that if a publication meets the federal test as an obscenity, it may be banned under both the state and federal constitutions. The magazine in Reece clearly is "obscene" under that test. The trial court in Reece correctly instructed the jury that to convict defendants it must find *Chains and Whips* was "lewd matter" and defined "lewd matter" as

> synonymous with obscene matter and means any matter:
> (A) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and
> (B) Which the average person, applying contemporary community standards, would find explicitly depicts or describes patently offensive representations or descriptions of:
> Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape, or torture; and
> (C) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

Instruction 14, Supplemental Clerk's Papers, at 16.

In Reece, the jury found the defendants guilty as charged. We are required as a reviewing court to make an independent constitutional determination of the obscenity of the publication in question here. *Tacoma v. Mushkin*, 12 Wn. App. 56, 59, 527 P.2d 1393 (1974) (citing *Jacobellis v. Ohio*, 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676 (1964)). After a review of the publication *Chains and Whips*, we conclude that the jury was correct in finding that by community standards the publication appeals to the prurient interest, is offensive by community standards, and lacks serious literary, artistic, political or scientific value.

The federal definition of obscenity spelled out in the 3–part *Miller* test is the constitutional threshold below which the states may not go. The Washington courts have long allowed the Legislature to struggle with the attempt to regulate obscenity so long as the *Roth–Miller* test was met. *State v. Regan*, 97 Wn.2d 47, 640 P.2d 725 (1982). This

task is one traditionally left to the Legislature. Prior Washington case law has consistently indicated that obscenity may be prohibited by criminal statute. *State v. Regan, supra; State v. Hull,* 86 Wn.2d 527, 546 P.2d 912 (1976); *State v. J–R Distribs., Inc.,* 82 Wn.2d 584, 512 P.2d 1049 (1973); *Fine Arts Guild, Inc. v. Seattle, supra; State v. Holedger,* 15 Wash. 443, 46 P. 652 (1896). In *State v. Coe, supra,* this court stated, "[W]e have expressly rejected an absolute bar against prior restraints on speech which is *not* constitutionally protected. *Seattle v. Bittner,* [81 Wn.2d 747, 757, 505 P.2d 126 (1973)] (obscenity); *Fine Arts Guild, Inc. v. Seattle,* 74 Wn.2d 503, 512–13, 445 P.2d 602 (1968) (obscenity)." *Coe,* 101 Wn.2d at 375.

[3, 4] The Washington Supreme Court has in the past and will continue in the future to accept its duty to interpret its constitution to be more protective of individual rights than the federal constitution. "We have often independently evaluated our state constitution and have concluded that it should be applied to confer greater civil liberties than its federal counterpart *when the reasoning and evidence indicate such was intended and is necessary.*" (Italics ours.) *Alderwood,* at 238. The *Gunwall* case has afforded guidance on when our constitution should be interpreted to extend broader rights than the federal constitution. In *State v. Gunwall, supra,* we set out six nonexclusive criteria to be used in determining the scope of protection provided by state constitutional provisions: (1) the language of the state constitution; (2) significant differences in language between parallel provisions of the federal and state constitutions; (3) constitutional history; (4) preexisting state law; (5) structural differences between the federal and state constitutions, and (6) whether the subject matter is of particular state or local concern. The proper inquiry under *Gunwall* is not to ask whether state constitutional analysis is necessary, but to ask whether on a given subject matter the Washington constitutional provision

should afford greater protection than the minimum protection afforded by the federal constitution. There is no presumption of adherence to federal constitutional analysis.

The question to be asked here is not whether the concept of free speech is interpreted more broadly under the state constitution than under the federal constitution. This court has already answered this question in the affirmative. *Bering v. Share, supra; State v. Coe, supra.* The question at issue here is whether *obscenity* is to be afforded broader protection under the state constitution than under the federal constitution.

The first two criteria of *Gunwall* direct the court's attention to the language of the state constitution and the parallel provision of the federal constitution. The language of article 1, section 5 is different from the language of the First Amendment. Const. art. 1, § 5 provides:

> Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

The First Amendment provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . .

While this will always be the beginning of state constitutional analysis, it is not the end. If it were, the other criteria enunciated in *Gunwall* would be superfluous. As Justice Utter has pointed out, there are differences between statutory and constitutional construction. "[A] constitution is an expression of the people's will and depends for its validity on their ratification. Thus, the 'common and ordinary meaning' in which the constitution's words must be construed is the meaning they would have had to the vast majority of ordinary voters". Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights,* 7 U. Puget Sound L. Rev. 491, 510 (1984). It is therefore relevant to note that obscenity was criminalized both immediately prior to and after the ratification of the state constitution.

See Laws of 1885, p. 122–23; Laws of 1891, ch. 69, § 24, p. 126.

The third *Gunwall* factor directs the court to ask whether the "[s]tate constitutional and common law history" reflect an intention to confer greater protection from the state government than has been afforded by the federal constitution. *Gunwall*, at 61. Historical analysis is relevant though not necessarily dispositive in a question of state constitutional interpretation. The court should be free to consider current values and conditions as one factor in interpreting the state constitution. *See* Utter, 7 U. Puget Sound L. Rev. at 524. However, on the question of protection for obscene material, there is no clear conflict between Washington common law history and current values and conditions. Obscenity has never enjoyed constitutional protection in Washington and the court does not perceive current conditions to warrant such protection.

Gunwall also directs the court's attention to preexisting state law which "can thus help to define the scope of a constitutional right later established." *Gunwall*, at 62. As noted above, obscenity was criminalized prior to the ratification of article 1, section 5 of the Washington State Constitution. Neither statutory law nor case law in Washington have ever afforded protection for obscene speech. *See, e.g., State v. Regan, supra; State v. Hull, supra; State v. J–R Distribs., Inc., supra; Fine Arts Guild, Inc. v. Seattle, supra.* Early legislative construction of a provision should be given great weight, especially if it extended over a long period of time. Similarly, early constructions by the courts are relevant to the intent of various constitutional provisions. Utter, 7 U. Puget Sound L. Rev. at 521.

Other state supreme courts, in construing their state constitutional free speech guaranties which are very similar to the wording of article 1, section 5, have refused to extend state constitutional protection to obscene expression that under the federal test does not enjoy constitutional protection. *Portland v. Jacobsky*, 496 A.2d 646 (Me. 1985); *People v. Neumayer*, 405 Mich. 341, 275 N.W.2d 230 (1979).

Neumayer recognized that the language of article 1, section 5 of the Michigan Constitution (virtually identical to article 1, section 5 of the Washington Constitution) in certain instances may confer broader protection upon certain types of expression than the First Amendment. However, that court rejected the notion that obscenity is protected by the state constitution.

The fifth *Gunwall* criteria considers the difference in the structure between the federal and state constitutions, and notes that the federal constitution is a grant of enumerated powers, while the state constitution acts as a limitation on the otherwise plenary powers of state government. *Gunwall*, at 62. This distinction simply reinforces the responsibility the Washington court has to engage in independent state analysis and afford broader protection when necessary. Often state and federal constitutions have conferred the same protection. *Alderwood Assocs. v. Washington Envtl. Coun.*, 96 Wn.2d 230, 238, 635 P.2d 108 (1981) (citing *Young v. Konz*, 91 Wn.2d 532, 588 P.2d 1360 (1979); *Hillside Comm'ty Church, Inc. v. Tacoma*, 76 Wn.2d 63, 455 P.2d 350 (1969)). However, there is no presumption that the minimum degree of protection established by the federal constitution is the degree of protection to be afforded under the Washington Constitution.

Gunwall also advises the court to ask whether the matter is of particular state or local interest or whether there is a need for national uniformity. *Gunwall*, at 67. Although there is some interest in uniformity because of interstate traffic in publications, obscenity is largely a local concern. The local nature, however, does not militate in the area of obscenity for enhanced state constitutional protection for obscene material.

Prior reliance on federal precedent and federal constitutional provisions does not preclude this court from taking a more expansive view under the Washington Constitution, especially *where the United States Supreme Court determines to limit federal guaranties in a manner inconsistent with our prior pronouncements. State v. Jackson*, 102

Wn.2d 432, 439, 688 P.2d 136 (1984). However, it does not follow, especially where the federal protections have not been curtailed, that we will automatically cease to follow our own precedents merely because they have tracked the federal precedents.

Gunwall recognized that "[t]he opinions of the Supreme Court, while not controlling on state courts construing their own constitutions, are nevertheless important guides on the subjects which they squarely address." *Gunwall*, at 61 (quoting *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982) (Handler, J., concurring)). Obviously, this court need not construe article 1, section 5 as the federal courts have construed the First Amendment. However, this court may find federal reasoning persuasive even while construing our own constitution.

The language of article 1, section 5 is significantly different from the First Amendment and often will support a broader protection for free speech in Washington. The narrow inquiry in this case is whether "obscene" speech (*see State v. Regan*, 97 Wn.2d 47, 640 P.2d 725 (1982)) deserves broader protection under article 1, section 5 than it is afforded by the federal case law construing the First Amendment. After consideration of the *Gunwall* criteria and in light of state constitutional history and preexisting state law, we conclude that in the limited area of obscene speech, article 1, section 5 does not afford broader protection.

One final constitutional argument is raised by defendants, namely, that RCW 9.68.140 and 7.48A.010 are void ab initio because they were enacted pursuant to an invalid emergency clause in contravention of the guaranteed right to referendum under Const. art. 2, § 1. This argument was recently addressed and rejected in *State v. Hayes*, 108 Wn.2d 344, 738 P.2d 276 (1987).

III

Other Claims of Error

Defendants in Reece raise various claims of error in addition to their constitutional claims. First, defendants argue that even if RCW 7.48A.010 and 9.68.140 are constitutional, the publication *Chains and Whips* does not as a matter of law constitute obscene material because it depicts merely bondage and fetishism and not the sort of "[v]iolent or destructive sexual acts" required under the statute. We disagree. The magazine depicts nude and scantily clad persons engaged in acts of flagellation, beatings and torture. There is a strong intimation of sexual behavior. Although the pictures are clearly simulated, they nonetheless represent "[v]iolent or destructive sexual acts" within the meaning of RCW 7.48A.010(2)(b)(iii).

Defendants in Reece further argue that the prurient appeal of materials such as *Chains and Whips* which are aimed at a deviant subgroup must be established by some evidence in addition to the materials themselves. They contend the prosecutor's failure to provide such evidence deprived them of due process and violated RCW 9A.04.100 which requires that each element of a crime be proved "by competent evidence beyond a reasonable doubt."

In *State v. J-R Distribs., Inc.*, 82 Wn.2d 584, 597–98, 512 P.2d 1049 (1973), *cert. denied*, 418 U.S. 949 (1974), this court held that no evidence other than the allegedly obscene material itself is required as a matter of federal law (citing *Kaplan v. California*, 413 U.S. 115, 37 L. Ed. 2d 492, 93 S. Ct. 2680 (1973)). Yet, neither *J-R Distribs.* nor the federal cases on which it relied dealt with materials depicting bondage, fetishism and torture, as opposed to more commonplace sexual conduct. *United States v. Klaw*, 350 F.2d 155, 166–67 (2d Cir. 1965) held that the prurient appeal of "bondage" booklets is beyond the knowledge of ordinary jurors and must therefore be established with extrinsic evidence. However, the United States Supreme Court has since expressly reserved judgment on whether expert testimony is necessary to explain the prurient appeal

of deviant oriented materials. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 n.6, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973); *see also State v. Summers*, 692 S.W.2d 439, 445 (Tenn. Crim. App. 1985) (concluding that expert testimony was not required to prove prurient appeal of a film depicting various forms of sadomasochistic conduct).

[5] We find that expert testimony is not required to establish the obscene nature of materials aimed at a deviant subgroup. The obscenity test requires jury determination of an abstract standard in light of collective experience. Such a standard is not unlike criminal negligence crimes, where expert testimony is not required, in which the jury must find that the defendant's conduct grossly deviated from that of the ordinary reasonably prudent person. *See* RCW 9A.08.010(1)(d).

[6] Defendants next argue that there was insufficient evidence to show that defendants Reece and Styers were operating for "profit–making purposes" as is required under RCW 9.68.140. The statute does not specially define the meaning of the phrase "profit–making purposes". Defendants argue that because Reece was a salaried employee and Styers was paid an hourly wage, they did not act for "profit–making purposes". Defendants also contend the Legislature did not intend for RCW 9.68.140 to reach mere employees. We reject defendants' arguments. The magazines at issue here were sold above the wholesale cost, and profit was made. The fact that the defendants did not personally receive a commission and had no proprietary interest in the business does not negate the fact that their actions were done for the purpose of making a profit.

This court has often recognized that a statute must be read to avoid absurd results. *See, e.g., General Tel. Co. v. Utilities & Transp. Comm'n*, 104 Wn.2d 460, 471, 706 P.2d 625 (1985). Defendants' construction would lead to an exemption for nonprofit corporations. Thus, entrepreneurs could set up a nonprofit corporation, pay themselves a salary, and thereby insulate their activities from prosecution under the statute. In addition, defendants' construction

would exempt corporations, even J–R Distributors, which operate at a "loss" rather than a "profit". It is absurd to suggest that the Legislature intended the result reached by defendants' construction. We conclude that all those whose actions further "profit–making purposes" come within the purview of the statute. The evidence was sufficient to show that defendants Reece and Styers, as bookstore employees, were operating for "profit–making purposes".

IV

Conclusion

We conclude that RCW 9.68.140, to the extent it proscribes obscenity as defined in RCW 7.48A.010, comports with both state and federal constitutional requirements. We affirm the convictions in Reece; we reverse and remand for trial in J–R Distributors.

Dolliver, Dore, Andersen, and Durham, JJ., concur.

Andersen, J. (concurring with majority)—I agree with much of what Justice Utter writes in his dissent concerning the breadth of the state constitution's protection of free speech and press. As the majority opinion explains, however, *obscenity* has never been protected by either the state or the federal constitutions.

Utter, J. (dissenting)—The constitutional protection of free speech is one of the noblest and most courageous foundations of our nation and our state. It is sadly ironic that this protection is being used by those who would degrade our society. However, it is in the context of determining to protect speech that we find to be demeaning and repugnant that our true commitment to the doctrine is tested.

The gist of the majority's analysis is that, despite the explicit language of Const. art. 1, § 5, it does not protect expression that was the subject of a statute near the time of the ratification of our constitution. I find, in spite of my

personal repulsion with the subject matter, that nonetheless I am mandated to follow the explicit language of our constitution to afford protection to speech on "all subjects," whether or not this provides broader protection than the United States Constitution. Therefore, I dissent.

As an initial matter, we must define the issue before us. The relevant statute does not limit itself to "the interests of unwilling viewers, captive audiences, minors and beleaguered neighbors", *State v. Henry*, 302 Or. 510, 525, 732 P.2d 9 (1987), but instead absolutely forbids access by consenting adults to the offending material. Even a finding that RCW 9.68.140 is unconstitutional would not, as the Oregon Supreme Court stated in *Henry*, "rule out regulation, enforced by criminal prosecution, directed against conduct of producers or participants in the production of sexually explicit material, nor reasonable time, place and manner regulations of the nuisance aspect of such material or laws to protect the unwilling viewer or children." *Henry*, at 525. The issue is not whether regulation is possible, but how such materials will be regulated.

Citizen action can be highly effective in curtailing the unwelcome spread of pornography. In his book, *Kingdoms in Conflict* (1987), Charles Colson relates a story of a successful citizen effort, at pages 262–63:

> When Jack Eckerd, founder of the Eckerd Drug chain, became a Christian in 1983, he called the company president and urged him to take *Playboy* and *Penthouse* magazines out of the Eckerd stores. The executive protested, telling him the magazines amounted to several million dollars a year in business. Jack Eckerd persisted. Eventually all 1,700 Eckerd drugstores stopped carrying *Playboy* and *Penthouse*. Eckerd then wrote to the directors of other retail stores and encouraged them to do the same. When his letters went unanswered, he wrote again. [Footnote: This story is told in more detail in Jack Eckerd, *Finding the Right Prescription* (Old Tappan, N.J.: Revell, 1987).]
>
> Meanwhile, the National Coalition Against Pornography was picketing and boycotting stores selling "adult" magazines. The pressure began to pay off. One by one

Revco, People's, Rite Aid, Dart Drug, Gray Drug, and High's Dairy Stores pulled pornography from their shelves. And finally 7–11 removed these magazines from its 4,500 stores and recommended that its 3,600 franchises do the same.

Thus, without one debate before Congress or one case entangled in the courts, the shelves of nearly 12,000 retail stores were cleared of pornography!

Playboy's lawyers, shocked at their declining circulation, charged that a letter from the Meese Commission had put coercive pressure on the stores. Maybe so. But the real impetus came from the little platoons—thousands of individuals and one courageous man who put his faith into practice in his own business.

The sole question presented for this court to decide is the constitutionality of a statute that forbids at any time or place the sale to consenting adults of literature that does not comport with "a uniform vision of how human sexuality should be regarded and portrayed." L. Tribe, *American Constitutional Law* § 12–16, at 662 (1977).

The majority purports to apply the six nonexclusive criteria of *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) as interpretive guides to determine Const. art. 1, § 5 does not protect obscenity. A closer examination reveals that the majority's *Gunwall* analysis is incorrect and reaches the wrong result.

Language

The majority does not even grant the express language of Const. art. 1, § 5 the dignity of a discussion, other than to state that the language is the beginning of state constitutional analysis. Instead of attempting to determine what the language of the provision means, the majority states that concentration on the language of the constitutional provision would make the other *Gunwall* criteria superfluous. Majority, at 778. However, if the text of a constitutional provision is unambiguous, further construction can be unwarranted. *State ex rel. Anderson v. Chapman*, 86 Wn.2d 189, 191, 543 P.2d 229 (1975).

Const. art. 1, § 5 provides:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

Because we are asked in this case to consider the constitutionality of a ban on certain obscene materials, the relevant inquiry is whether such speech falls within the constitutional provisions allowing persons to "freely speak" on "all subjects".[1]

The majority correctly notes that in interpreting the words of the constitution, we should consider their common meaning. *State v. Brunn*, 22 Wn.2d 120, 139, 154 P.2d 826, 157 A.L.R. 1049 (1945); *see also State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 557, 452 P.2d 943 (1969). Instead of doing so, however, the majority looks to the statutory context. Majority, at 778.

The language of Const. art. 1, § 5 unambiguously protects speech on *all* subjects, which must include the subjects listed in RCW 7.48A.010. Const. art. 1, § 5 allows the citizens of this state to "freely speak" on those subjects. The relevant dictionary definitions of the terms "free" and "freely" contain the concept of being "unrestrained" or "without hindrance." *Webster's Third New International Dictionary* 904, 906 (1981); 4 *Century Dictionary and Cyclopedia* 2366, 2369 (1913). The adjective "free" modifying "speech" means "[c]haracterized by liberty in the expression of sentiments or opinions; uttered or expressed without reserve; frank, plain-spoken." 4 *Oxford English Dictionary* 522 (25) (1933). In literature written shortly before the ratification of our constitution, "free" as a modifier of "speech" took the meaning "[n]ot observing due bounds, 'loose', licentious." 4 *Oxford English Dictionary* 522 (25)(b) (1933) (citing Thackeray and Tennyson). Because the language of Const. art. 1, § 5 is unambiguous in protecting speech, even the offensive speech listed in RCW

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[1]The issue of whether the distribution of the materials at issue in this case might constitute an "abuse" of the right to free speech is not at issue here because there is no allegation of direct harm resulting from the materials. *See Bering v. Share*, 106 Wn.2d 212, 721 P.2d 918 (1986), *cert. dismissed*, ___ U.S. ___, 93 L. Ed. 2d 990, 107 S. Ct. 940 (1987).

7.48A.010, we need look no further in our constitutional interpretation. *State ex rel. Anderson*, at 191.

DIFFERENCES IN LANGUAGE

The majority does not address the second *Gunwall* criterion, other than to note that the language of Const. art. 1, § 5 and the first amendment to the United States Constitution differ. Majority, at 778. In fact, this court has consistently held in the most recent cases addressing this issue that the very different languages of the two constitutions require giving our constitution a broader interpretation. *Bering v. Share*, 106 Wn.2d 212, 245, 721 P.2d 918 (1986), *cert. dismissed*, ___ U.S. ___, 93 L. Ed. 2d 990, 107 S. Ct. 940 (1987); *State v. Coe*, 101 Wn.2d 364, 374, 679 P.2d 353 (1984); *Alderwood Assocs. v. Washington Envtl. Coun.*, 96 Wn.2d 230, 635 P.2d 108 (1981).

The United States Supreme Court has determined that obscenity does not fall under the free speech protection of the First Amendment. *E.g., Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973). Thus, under the United States Constitution, there is such a thing as "unprotected speech." The Washington Constitution, on the other hand, leaves no room for "unprotected speech" to exist. It protects speech on "all subjects". It is hard to imagine how the language of our constitution could be less unambiguous in its absolute protections of speech.

CONSTITUTIONAL AND COMMON LAW HISTORY

"The history of the adoption of a particular state constitutional provision may reveal an intention that will support reading the provision independently of federal law." *Gunwall*, at 61. Before the Preamble and Bill of Rights Committee adopted the language that was to become Const. art. 1, § 7, it considered several proposals for the language and produced two formal drafts. *See* Utter, *The Right To Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment*, 8 U. Puget Sound L. Rev. 157 (1985). The language finally adopted is the

most protective of rights to free speech of the drafts considered. *State v. Rinaldo,* 36 Wn. App. 86, 93, 673 P.2d 614 (1983), *aff'd,* 102 Wn.2d 749, 689 P.2d 392 (1984) (some of the reasoning of the Court of Appeals was questioned by the plurality).

> Those hardy frontier lawyers, newspaper people and their colleagues at the 1889 constitutional convention said it as clearly as they possibly could—the right to free speech and press in the State of Washington is a privilege guaranteed to all, and so long as it is not abused is absolute. Then to insure that this right would not be tampered with by future legislatures or courts, they wrote the privilege into our state constitution.

Rinaldo, at 93–94. The history behind the adoption of Const. art. 1, § 5 supports giving this provision the most liberal interpretation possible.

PREEXISTING LAW

In *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986), we recognized "preexisting state law" as one of the noninclusive factors that may be of benefit in determining the coverage of the Washington Constitution:

> Previously established bodies of state law, including statutory law, may also bear on the granting of distinctive state constitutional rights. State law may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims. Preexisting law can thus help to define the scope of a constitutional right later established.

Gunwall, at 61–62. The majority relies on the fact that there were statutes penalizing the distribution of obscene material before and after the ratification of the Washington Constitution (Laws of 1885, p. 122–23; Laws of 1891, ch. 69, § 24) to conclude that obscenity is not protected. This analysis is misguided.

The true focus of this *Gunwall* factor should be on whether the constitution responds to a concern already addressed by legislation. An example of how this analysis should apply is found in *Gunwall* itself. This court found the fact that this state has a long history of extending

strong protections to telephonic communications lends strong support to extending broader protections under the state constitution than the United States Constitution for such communications. *Gunwall*, at 66.

The majority's approach is to *limit* the scope of a constitutional provision through statutes that violate its explicit terms. This is surely unintended. If anything is clear it is that the constitution overrides statutes. Const. art. 27, § 2 (only laws that are not repugnant to the constitution remain in force). The fundamental strength of the constitution is that it forces us, having declared basic principles, to apply those principles uniformly, even if such a result may not be popular in some instances and even where we must nullify a statute. *See* Const. art. 1, § 32 (fundamental principles).

The majority's analysis would seem to diminish the dignity and courage of our constitution, which was designed to protect speech even where it is repugnant to the majority of citizens. Moreover, the majority has not considered how its analysis would require us to find constitutional restrictions of free speech simply because such restrictions were part of the statutory scheme around the time of the ratification of the constitution. In fact, the logical extension of the majority's analysis, which in essence relies exclusively on the existence of statutes at the time of the ratification of the constitution as defining the scope of a constitutional protection, is that statutes enacted in the late 19th century have special immunity from constitutional challenges and can in fact control now in situations far from the intent of drafters of those statutes.

As discussed above, a finding that RCW 9.68.140 is unconstitutional does not prevent regulation of the pornography industry and reasonable time, place and manner restrictions. A successful struggle against pornography can be waged without the passage of laws that effectively totally ban offensive expression.

VAGUENESS AS PRIOR RESTRAINT

The majority does not address appellants' challenge that RCW 9.68.140 and RCW 7.48A.010 are vague and thus act as an unconstitutional prior restraint against speech. A law is unconstitutional "when it forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application." *Burien Bark Supply v. King Cy.*, 106 Wn.2d 868, 871, 725 P.2d 994 (1986). Where a statute involves speech, vagueness is not tolerable. "[S]tandards of permissible statutory vagueness are strict in the area of free expression." *NAACP v. Button*, 371 U.S. 415, 432, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963). The roots of the vagueness doctrine are in constitutional protections of due process. *See Seattle v. Drew*, 70 Wn.2d 405, 408, 423 P.2d 522, 25 A.L.R.3d 827 (1967).

In *State v. Henry*, 302 Or. 510, 732 P.2d 9 (1987), the Oregon Supreme Court considered the constitutionality of an obscenity statute under the Oregon Constitution. Although it resolved the case by determining that "all subjects" in its constitution encompasses obscenity, it also approved of the holding of the Oregon Court of Appeals that statutes defining obscenity by contemporary community standards are inherently vague:

> The indeterminacy of the crime created by [the obscenity statute defined by the *Miller* test] . . . lies in tying the criminality of a publication to "contemporary state standards." Even in ordinary criminal law, we doubt that the legislature can make it a crime to conduct oneself in a manner that falls short of "contemporary state standards." In a law censoring speech, writing or publication, such an indeterminate test is intolerable. It means that anyone who publishes or distributes arguably "obscene" words or pictures does so at the peril of punishment for making a wrong guess about a future jury's estimate of "contemporary state standards" of prurience.

(Footnotes omitted.) *State v. Henry, supra* at 513. I find this analysis compelling. Equally compelling is Justice Brennan's dissent in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 87–88, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973):

> [E]ven the most painstaking efforts to determine in advance whether certain sexually oriented expression is obscene must inevitably prove unavailing. For the insufficiency of the notice compels persons to guess not only whether their conduct is covered by a criminal statute, but also whether their conduct falls within the constitutionally permissible reach of the statute. The resulting level of uncertainty is utterly intolerable, not alone because it makes "[b]ookselling . . . a hazardous profession," but as well because it invites arbitrary and erratic enforcement of the law.

(Citation omitted.)

Although the United States Supreme Court has not been convinced that its obscenity definition is vague under the United States Constitution, this definition, and the definition of RCW 7.48A.010 violate the Washington Constitution, even without invoking principles of due process. Vague restraints on the freedom of speech act as prior restraints of speech. In *State v. Coe*, 101 Wn.2d 364, 374, 679 P.2d 353 (1984), we stated that the plain language of Const. art. 1, § 5 precludes prior restraints, leaving the State with only post–publication sanctions to punish abuse of free speech rights. One type of prior restraint is an order prohibiting publication, such as this court held unconstitutional in *Coe*. Even less tolerable is a prior restraint in the form of a vague statute, which necessarily results in heavy self–censorship to avoid criminal prosecution. The reason this is even less tolerable is that the materials restrained are not clearly and narrowly defined, and so there will be a broad range of materials suppressed as the publisher attempts what can only be a guess at what speech will offend community standards.

I would hold that Const. art. 1, § 5 protects speech on all subjects, including the subjects listed in RCW 9.68.140 and RCW 7.48A.010. The Legislature and citizens of this state have many legitimate means to combat pornography, but a total ban on the publication or sale of materials that offend community standards is not one of them. Moreover, the

vague definitions in RCW 7.48A.010 act as an unconstitutional prior restraint on the freedom of speech. I would reverse the convictions.

PEARSON, C.J., and BRACHTENBACH, J., concur with UTTER, J.

CALLOW, J.—I concur in Justice Utter's comments on the unconstitutionality of RCW 7.48A.010 and 9.68.140 in light of Const. art. 1, § 5. I cannot embrace the suggestion that economic coercion is acceptable as a method for suppressing the dissemination of ideas.

[No. 54186–8. En Banc. June 23, 1988.]

In the Matter of the Personal Restraint of DAWSON KING, *Respondent*, THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, *Petitioner*.

[1] **Statutes — Construction — Conflicting Provisions — Resolution.** A court will reconcile conflicting statutes to the extent possible so that each is given effect.

[2] **Contempt — Character — Determination.** A contempt sanction is criminal if its purpose is to punish for past conduct and results in a determinate jail term with no opportunity for the contemnor to purge himself of the contempt. A contempt sanction is civil if its purpose is to coerce compliance with a court order and results in an indeterminate jail term with the contemnor able to purge himself of the contempt by complying with the order.

[3] **Contempt — Juveniles — Parental Relationship — Dependency — Order To Produce Child — Violation — Nature of Contempt.** When a person violates a court order to bring a child to a dependency hearing, the court's contempt power under RCW 13.34.070(6) includes incarceration for up to 7 days for criminal contempt under RCW 13.34.165(2) and indefinite incarceration for civil contempt to coerce compliance with the order under RCW 7.20.110.

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BYRON B. REECE, TERRY R. STYERS, AND J-R DISTRIBUTORS, INC., a Washington corporation, Appellants.	NO. 52665-6 Cons. w/53565-5 MANDATE Pierce Co. No. 851011907 King Co. No. 861044066
STATE OF WASHINGTON, Appellant, v. J-R DISTRIBUTORS, INC., a Washington corporation; RICHARD NELSON REGAN and MICHAEL DAVID REGAN, Respondents.	

The State of Washington to: The Superior Court of the State of Washington in and for Pierce and King Counties

APPENDIX B-1

This is to certify that the opinion of the Supreme Court of the State of Washington filed on June 23, 1989 [sic], became the decision terminating review of this court in the above entitled case on March 23, 1989. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: $184.97 in favor of Respondent in #52665-6 and $72.51 in favor of Appellant in #53565-5. Order Denying Motion for Reconsideration was entered on March 23, 1989. Copy attached.

(Seal)

IN TESTIMONY WHEREOF, I have hereunto set my hand and

affixed the seal of said Court at Olympia, this 27th day of March, A.D. 1989.

/s/ C. J. Merritt
C. J. MERRITT

Clerk of the Supreme Court,

State of Washington

cc: Mr. Victor Hoff
Ms. Christine Quinn-Brintnall
Mr. Michael Danko
Mr. Jack Burns
Mr. Rex Armstrong

THE SUPREME COURT OF WASHINGTON

Nos. 52665-6, 53565-5

THE STATE OF WASHINGTON,

Respondent,

v.

BYRON B. REECE, ET AL,

Appellants.

ORDER DENYING MOTION FOR RECONSIDERATION

THE STATE OF WASHINGTON,

Appellant,

v.

J-R DISTRIBUTORS, INC., ET AL,

Respondents.

The Court having decided by majority vote that the motion for reconsideration of appellants Reece, et al, and respondents J-R Distributors, Inc., et al, should be denied,

It is ordered that the motion be and it hereby is denied.

Dated this 23rd day of March, 1989.

Keith M. Callow
Chief Justice

110 Wn.2d 766

APPENDIX C-2

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff,	)	NO. 85-1-01180-7
v.	)	DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
BYRON BLAKE REECE, et al., Defendants.	)	

Defendants are charged by information with having violated RCW 9.68.140. Defendants have moved to dismiss the information because RCW 9.68.140 is unconstitutional. The grounds for that motion are discussed in this memorandum.

* * *

II. RCW 9.68.140 IS UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

* * *

E. ADDITION OF REQUIREMENT THAT CONTEXT OF USE BE

CONSIDERED IN DETERMINING SERIOUS LITERARY, ETC. VALUE

The third prong of the tripartitie Miller test of obscenity is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." State v. Regan, supra.

The third prong of the definition of "lewd matter" in RCW 7.48A.010(b) is: "Which, when considered as a whole, and in the context in which it is used, [the matter] lacks serious literary, artistic, political, or scientific value." (Emphasis supplied).

The "value" element of the obscenity test goes to the very heart of the reason given for justification for denying speech that is "obscene" the protection of the First Amendment. As mentioned above, in Roth v. United States, supra,

the Supreme Court held that obscenity is not protected by the First Amendment because "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

In Memoirs v. Massachusetts, 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975 (1966), a plurality opinion in which only three justices concurred, said that material had to be "utterly" without social value before it could be adjudged obscene--that if material had even a "modicum" of social value it was protected by the First Amendment. Undoubtedly to ease the burden of proving that material was utterly without redeeming social value, a burden the Supreme Court later called "a burden virtually impossible to discharge under our criminal standards of proof," Miller

v. California, supra, the plurality opinion in Memoirs said, and the court in Ginzburg v. United States, 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942 (1966), held, that it was appropriate to focus on the conduct of the defendant and, in cases where the social value issue was "close," it was appropriate to consider "the context of the circumstances of production, sale, and publicity" on the question of obscenity.

One can speculate that perhaps the legislature believed that that language in Memoirs and the holding in Ginzburg authorized it to add the requirement that the context of use be considered in determining the third prong of the test for obscenity. If it believed that, it was clearly mistaken. The three-Justice opinion in Memoirs was expressly repudiated in Miller, 413 U.S. at 23, and

Ginzburg is simply passe.

The current constitutional test of obscenity was formulated in Miller. In Miller the court recognized that there had been no test of obscenity upon which a majority of the court agreed since Roth. The Miller formulation does not include consideration of the context of use. Rather, the court in Miller eased the "value" portion of the test by rejecting "utterly without redeeming social value" espoused in Memoirs and substituting lack of "serious literary, arttistic, political, or scientific value." And that is the test adoped in the state by the Washington Supreme Court.

Moreover, RCW 7.48A.010(2)(c), as written, would dictate consideration of context of use in all cases, not just in close cases as required by Ginzburg.

Even if Ginzburg were not passe and it would be constitutionally permissible to consider the context as bearing on the value issue in all cases (and not just "close" cases), the formulation of RCW 7.48A.010(2)(c) would still not pass constitutional muster as applied to criminal prosecutions under RCW 9.68.140.

The critical language is "the context in which [the motion picture film or publication] is used." The statute mandates that the context of use be considered in determining whether the matter "lacks serious literary, artistic, political, or scientific value." Note that neither economic nor commercial value is included among the values that can redeem an otherwise obscene film or publication.

The latter point is critical because an essential element of the crime

defined by RCW 9.68.140 is that the use of the allegedly obscene material be for its economic or commercial value.

RCW 9.68.140 provides that: "A person who, for profit-making purposes and with knowledge, sells, exhibits, displays, or produces any lewd matter . . . is guilty . . . ." (Emphasis supplied.) Before an act is criminal under this law, it must be done for a "profit-making" purpose--it must be predicated on the value of the matter as merchandise.

The inclusion of the requirement that material be considered "in the context in which it is used," in the context of RCW 9.68.140, effectively does away with the value element. The intrinsic literary, artistic, political, or scientific value of the material is irrelevant if the context of use is considered and the use must necessarily

be as an article of commerce--a use predicated solely on its economic or commercial value. Clearly the Miller test contemplates that material having intrinsic serious literary, artistic, political, or scientific value enjoys the protection of the First Amendment.

* * *

NO. 52665-6

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

BYRON B. REECE, TERRY R. STYERS, and J-R DISTRIBUTORS, INC., Appellants.

OPENING BRIEF OF APPELLANTS

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APPENDIX E-1

C. RCW 9.68.140 IS UNCONSTITUTIONAL ON ITS FACE UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION BECAUSE THE INCORPORATED TEST OF "LEWD MATTER" IN RCW 7.48A.010 IS OVERBROAD

At least two elements of "lewd matter" in RCW 7.48A.010, are unconstitutional under the First and Fourteenth Amendments. The second prong of the definition is unconstitutional because it does not require that patent offensiveness be determined from the standpoint of the average person applying contemporary community standards. The third prong of the test is unconstitutional because of the added requirement that the suspect matter be considered "in the context in which it is used" in determining its serious literary, artistic, political, or scientific value.

These issues were not raised in the Supreme Court in Brockett v. Spokane

Arcades, Inc., supra. See note 3, 86 L.Ed.2d, at 400, and are not foreclosed by that decision.

* * *

2. Context of Use

RCW 7.48A.010(2)(c) requires that "the context in which [the matter] is used" be considered in determining whether the matter lacks serious literary, artistic, political, or scientific value. That dramatically alters the serious value test, and permits condemnation of material that is constitutionally protected because of its intrinsic value. It is also obviously vague because no guidance whatever is provided as to the manner in which the use of a publication or film bears on its serious value.

Under RCW 9.68.140, the criminal "lewd matter" law, inclusion of the

requirement that context of use be considered in determining whether material lacks serious value obviously renders the test of lewd matter" unconstitutional because it effectively negates the "serious . . . value" prong of the test. That is because RCW 9.68.140 criminalizes the sale, exhibtion, display or production of "lewd matter" only if it is for "profit-making purposes. In order for the criminal statute to apply, a defendant's use of the "matter" ("a motion picture film or a publication (which includes any "book or magazine," RCW 7.48A.010(9)) or both," RCW 7.48A.010(4)) must be for its commercial value, to the exclusion of any other values it may have.

For these reasons, the addition of the requirement that the "context in which [the matter] is used" to the

"serious . . . value" prong of the Miller test renders the definition of "lewd matter," at least in the context of a criminal prosecution of a bookseller under RCW 9.68.140, unconstitutional on its face under the First and Fourteenth Amendments.

* * *

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, v. J-R DISTRIBUTORS, INC., a Washington corporation, RICHARD REGAN and MICHAEL REGAN, Defendants.	)	NO. 86-1-04406-6 DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

* * *

II. UNCONSTITUTIONALITY OF DEFINITION OF "LEWD MATTER" UNDER FEDERAL CONSTITUTION

* * *

D. Requirement that Context of Use be Considered in Determining Lack of Serious Value

The most obvious vice of the inclusion of the requirement that the context of use be considered in assessing the serious value of matter is that it effectively negates the constitutionally critical serious value element in

criminal cases.

It is important to note that the "context" that must be considered under sub-part (c) is the context of the use of the matter. As above noted, "matter" is defined in subsection (4) as "a motion picture film or a publication or both." "Publication" is defined in subsection (9) as including "any book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or coin-operated machine."

RCW 9.68.140 makes it a crime to sell, etc. "any lewd matter as defined in RCW 7.48A.010." "Lewd matter" is defined by RCW 7.48A.010(2) as "any matter" that meets the three-pronged test thereafter set out. In this case, it is alleged that various named magazines constitute "lewd matter."

The signficance of this is that the

context referred to is not the context of, for example, one photograph in a 40 page magazine, but is the context of "use" of the magazine itself.

Under RCW 9.68.140, the sale, display or production of a magazine (assuming it constitutes "lewd matter") is not a crime unless it is done "for profit-making purposes." To put it another way, only if "lewd matter" is used for the purpose of making a profit can the use be a criminal act. Only, therefore, if a magazine is used for its value as a commodity that produces a profit when sold, exhibted, displayed or produced, to the exclusion of any other value it may have, is its use possibly criminal.

"Value" as used in sub-part (c) and the Miller test clearly does not refer to the monetary or commercial value of the

matter. If it does, obviously the crime of promoting pornography as defined in RCW 9.68.140 could never be committed because all material sold, exhibited, displayed or produced for profit-making purposes is sold, exhibited, displayed or produced because of its monetary or commercial value. Rather, the requisite "value" is its societal value arising from its intrinsic quality.

Requiring that a jury consider the "context in which [the matter] is used," tells the jury that it is not to consider the intrinsic value of the matter, but the use that the defendant made of the matter. When that use is necessarily limited to use of the matter for its commercial or monetary value, which it must be for the use to be a crime, the intrinsic literary, artistic, political, or scientific value of the matter, if

any, is meaningless because it is not being used for a purpose related to that intrinsic value. By effectively negating this essential element of the constitutional test of obscentiy, the definition of "lewd matter" is unconstitutional under the First and Fourteenth Amendments, as applied to criminal prosecutuons under RCW 9.68.140.

* * *

NO. 53565-5

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant,

v.

J-R DISTRIBUTORS, INC., RICHARD NELSON REGAN, and MICHAEL DAVID REGAN, Respondents.

BRIEF OF RESPONDENTS

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APPENDIX G-1

L. ALTERNATIVE FEDERAL CONSTITUTIONAL GROUNDS--THE DEFINITION OF "LEWD MATTER" IN RCW 7.48A.010 IS UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENT REQUIREMENTS OF MILLER v. CALIFORNIA, AS REFINED

The definition of "lewd matter" in RCW 7.48A.010 is based on the test set forth by the Supreme court in Miller, but deviates from that test, as stated in Miller and refined by subsequent decisions, including State v. Regan, supra, in several respects. These deviations render the statutory definition unconstitutional under the First and Fourteenth Amendments.

* * *

3. RCW 7.48A.010(2)(c) requires that the context in which "matter" is used be considered in determining whether it lacks serious literary, artistic, political or scientific value.

RCW 7.48A.010(2)(c) states the third prong of the test of "lewd matter" as

> Which, when considered as a whole, and in the context in which it is

used, lacks serious literary, artistic, political, or scientific value.

There is no precedent for including the "context in which it is used" requirement. This is the most patently erroneous deviation from the Miller test. It materially alters the third prong of the Miller test, and in the context of a criminal prosecution under RCW 9.68.140 virtually eliminates the serious value element entirely. Moreover, it increases the subjectivity and vagueness of the third prong.

While the statute requires that the jury consider the context of use, it is silent as to the effect context has on value. Jurors (and booksellers) must not only form an opinion (or guess) as to whether matter has intrinsic value, but must also form an opinion (or guess) as to the impact that the context in which

the matter is used has on the matter's intrinsic value, or lack of value.

"Matter" is defined as "a motion picture film or a publication or both." A "publication" includes "any book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or coin-operated machine." RCW7.48A.010(4) and (9). These definitions rule out construing "context in which it [the matter] is used" as meaning the context in which particular words, phrases or pictures appear within a book or magazine or film, as the state might argue. "Matter" is the entire book or magazine or film.

RCW 9.68.140 criminalizes the sale, display, etc. of "lewd matter" "for profit-making purposes." Therefore, to be the predicate of a criminal case, a defendant's "use" of the "matter" must be

a profit-making one. In other words, "the context in which" a defendant necessarily has "used" the "matter" is for its commercial value to the exlusion of any other values it may have.

Moreover, the "context" requirement introduces an element into the equation that bears no rational relationship to what the serious value element is all about. For example, if a book of Shakespeare's plays is used as a doorstop, consideration of the "context in which it is used" would mean that it has not "literary, artistic, political, or scientific value." A piece of wood could be used for the same purpose, and would have the same value, in context.

* * *

7.48A.010. Definitions

The definitions set forth in this section shall apply throughout this chapter.

(1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual or violent conduct which appears in the lewd matter, or knowledge of the acts of lewdness or prostitution which occur on the premises.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which explicitly depicts or describes patently offensive representations or descriptions of:

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or

(iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

(3) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.

(4) "Matter" shall mean a motion picture film or a publication or both.

(5) "Motion picture film" shall include any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;

(d) Film, glass slides, or transparencies, either in negative or positive form, designed for exhibition by projection on a screen;

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(6) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(7) "Place" includes, but is not limited to, any building, structure, or places, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(8) "Prurient" means that which incites lasciviousness or lust.

(9) "Publication" shall include any book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or coin-operated machine.

(10) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer of possession of, lewd matter.

Enacted by Laws 1982, ch. 184, § 1, eff. April 1, 1982.

88-1898

Supreme Court, U.S.
FILED
JUL 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

STATE OF WASHINGTON,

Respondent,

v.

BYRON REECE, TERRY R. STYERS, J-R DISTRIBUTORS, INC., a Washington corporation, RICHARD NELSON REGAN and MICHAEL DAVID REGAN,

Petitioners.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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NO. _____

IN THE
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OCTOBER TERM, 1989

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v.

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QUESTION PRESENTED

1. Should this court review a state court's construction of a state statute, under the state constitution[1] in which the state legislature required additional protection by providing that materials might vicariously absorb serious literary, artistic, scientific or political value from the context in which the items were used?

---

[1]This court previously upheld the statute against federal constitutional challenges in Brockett v. Spokane Arcades, 472 U.S. 491 (1985).

LIST OF ALL PARTIES TO THE PROCEEDINGS

Respondent: State of Washington, through Pierce County Prosecuting Attorney, John W. Ladenburg, and his deputy, Chris Quinn-Brintnall;

Petitioners: Byron Reece, Terry R. Styers, J-R Distributors, Inc., a Washington corporation, Richard Nelson Regan and Michael David Regan, through their attorney, Victor V. Hoff, P. O. Box 17514, Seattle, Washington 98107

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OPINIONS BELOW

The opinion below is reported at 110 Wn.2d 766 (1988) and 757 P.2d 947 (1988) together with a consolidated matter from another county and appended to the petition. The status of the consolidated party is not known.

JURISDICTION

Petitioner, Reece, invokes jurisdiction pursuant to 28 USC 1257(3), Supreme Court review of a final judgment of the highest court of a state which allegedly is repugnant to the constitution. The Washington Supreme Court opinion in question interprets a state statute based upon state constitution in a manner which is not repugnant but more protective than the federal constitution. The decision allows obscene material to escape prosecution if serious literary artistic, scientific or political values can be imputed to the material from the context in which it is used. I.e. evidence in a legal education course involving sexual terrorism; a prop in a stage production of "Portnoy's Complaint."

This court should decline to assert jurisdiction in this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Wash. Rev. Code 9.68.140:

A person who, for profit-making purposes and with knowledge, sells exhibits, displays, or produces any lewd matter as defined in RCW 7.48A.010 is guilty of promoting pornography. Promoting pornography is a class C felony and shall bear the punishment and fines prescribed for that class of felony. In imposing the criminal penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the felony. All fines assessed under this chapter shall be paid into the general treasury of the state.

Wash. Rev. Code 7.48A.010:

The definitions set forth in this section shall apply throughout this chapter.

(1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual or violent conduct which appears in the lewd matter, or knowledge of the acts of lewdness or prostitution which occur on the premises, or knowledge that controlled substances identified in ARticle II of chapter 69.50 RCW and not authorized by that chapter, are manufactured, delivered or possessed, or where any such substance not obtained in a manner authorized by chapter 69.50 RCW is consumed by ingestion, inhalation, or injection or any other means.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which explicitly depicts or describes patently offensive representations or descriptions of:

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or

(iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

(3) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.

(4) "Matter" shall mean a motion picture film or a publication or both.

(5) "Motion picture film" shall include any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;

(d) Film, glass slides, or transparencies, either in negative or positive form, designed for exhibition by projection on a screen;

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(6) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(7) "Place" includes, but is not limited to, any building, structure, or places, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(8) "Prurient" means that which incites lasciviousness or lust.

(9) "Publication" shall include any book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or coin-operated machine.

(10) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer of possession of, lewd matter.

U.S. Const. Amend 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Wash. Const. Art. 1 § 5:

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

STATEMENT OF THE CASE

On July 17, 1985, Pierce County Sheriff Officers executed a warrant at an adult book store owned by J-R Distributors, Inc., in Parkland, Washington, called Sportland. They were searching for copies of a magazine entitled "Chains and Whips" a copy of which had been purchased by an undercover officer on July 16, 1985.

Based on review of the magazine the Pierce County Prosecutor charged the manager, clerk and corporation with one count of promoting pornography in violation of Wash. Rev. Code 9.68.140 and Wash. Rev. Code 7.48A.010.

The matter was tried to a properly instructed jury which returned a verdict of guilty.

Ultimately the Supreme Court of the State of Washington, accepted review. The State Supreme Court examined the statute

under federal and state constitutional provisions and held that the statute met constitutional requirements.

No specific "context" issue was briefed and raised in the Reece case, although the challenge was presented in numerous other cases pending at the same time and was mentioned during oral argument.

REASONS FOR DENYING PETITION

Supreme Court Rule 17.1 sets forth three "Considerations Governing Review on Certiorari." This case meets none of them. Petitioner is requesting this court review and reinterpret a state statute fully and correctly construed by the highest court of the State of Washington under Washington State Constitution and this court under the federal constitution. The Washington Supreme Court's construction of the Washington promoting pornography state neither conflicts with a decision of another state court of last resort nor involves a question of federal law which needs to be reexamined by this court only four (4) years after having upheld the same statute.

I. THIS SUPREME COURT LACKS AUTHORITY TO CONSTRUE STATE STATUTES.

Petitioner invites this court to do what is previously refused to do and what the courts of Washington have refused to do: deliberately construe a state statue in a manner not intended by the legislature to render it unconstitutional.

It is the responsibility of the legislature, not the court, to define crimes. Morissette v. United States, 342 U.S. 246, 263 (1957). The Washington State Supreme Court properly left this matter to the legislature. This court should do the same.

This court generally lacks authority to construe state statues. United States v. Thirty-seven Photographs, 402 U.S. 363 (1971). Where, as in the instant case, state courts have construed state statutes in accordance with the federal constitution and under a more limiting state constitutional

provisions this court ordinarily accepts the construction given by the local court and will not substitute its own judgment for that of the highest court of the state. See, Baggett v. Bullitt, 377 U.S. 360 (1964); Garner v. Louisiana, 368 U.S. 157 (1961).

The construction given by the trial courts (both state and federal) which reviewed the constitutionality is as follows:

> The language of Article 1 Section 5 is significantly different from the First Amendment and often will support a broader protection for free speech in Washington. The narrow inquiry in this case is whether "obscene" speech . . . deserves broader protection under Article 1, Section 5 than is afforded by the federal case law construing the First Amendment.

State v. Reece, 110 Wn.2d 766, 757 P.2d 947 (1988).

"Finally, the third prong of Miller as embodied in Section 1(2)(c), is also attacked by plaintiffs as an impermissible expansion of settled precedent. This section provides

that material failing the first two prongs which also, "when considered as a whole, and in the context in which it is used, lacks serious literary, artistic or political, or scientific value" will be deemed obscene. Objection is taken to the phrase "in the context in which it is used." (Emphasis added).

Where this language found in either the first or second prongs, which are the province of the jury and already highly subjective in nature, this modification of Miller might prove more troubling . . . However, such is not the case here. By inserting the phrase in the third prong, i.e., the objective test, this language, if anything, serves a limiting function and enhances the specificity with which a trial court must address the existence of literary, artistic, political, or scientific value."

Spokane Arcades, Inc. v. Eikenberry, 544 F.Supp. 1034, 1039-40 (E.D. Wash. 1982).

Simply put, the test in Washington is whether the material taken as a whole and in the context of its use has any serious literary, artistic, political, or scientific value. In contrast, the pandering cases relied on by petitioner concern cases in which the material as a whole does not meet constitutional obscenity standards but the context gives it a meaning which does.

CONCLUSION

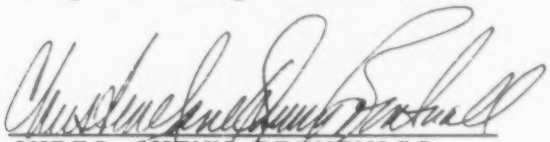
Petitioner's conviction is based upon substantial evidence falling within the hard core of the conduct proscribed by the statute. The jury's verdict was the natural result of careful fact finding and law application; as such it should remain undisturbed.

The statute was carefully drafted to meet or exceed the Miller and California, 413 U.S. 15 (1973) and Roth v. U.S., 354 U.S. 476 (1957), standards without infringing on constitutionally protected pornographic materials.

The statute has been fully examined first by the federal then the state courts and found to violate no federal or state constitutional provisions and should remain untouched by this court.

The State of Washington, therefore, respectfully requests that defendant's petition for a Writ of Certiorari be denied.

Respectfully submitted,



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